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CLERK OF DISTRICT COURT
SAN FRANCISCO, CALIF.

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SEARS HOLDINGS CORPORATION and SEARS,
11 ROEBUCK AND CO.

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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION
15

SC

16 PATRICK RODRIGUEZ, as an individual
17 and on behalf of all others similarly situated,

18 Plaintiff,

19 v.

20 SEARS HOLDINGS CORPORATION, a
corporation; SEARS, ROEBUCK AND CO.,
21 a corporation; and DOES 1 through 100,
inclusive,

22 Defendants.
23
24
25
26
27
28

CV 10 1268
Case No.

**DECLARATION OF CHRISTIAN N.
BROWN IN SUPPORT OF
DEFENDANTS SEARS HOLDINGS
CORPORATION AND SEARS,
ROEBUCK AND CO.'S NOTICE OF
REMOVAL**

1 I, Christian N. Brown, declare as follows:

2 1. I am a member of the State Bar of California and am authorized to practice
3 before this Court. I am an attorney with Orrick, Herrington & Sutcliffe LLP, attorneys of record
4 for Defendants Sears Holdings Corporation and Sears, Roebuck and Co. in this action. The facts
5 set forth in this declaration I know to be true of my own personal knowledge, except where such
6 facts are stated to be based on information and belief, and those facts I believe to be true. If
7 called as a witness I could and would testify competently to the matters set forth herein.

8 2. Attached hereto as **Exhibit A** is a true and correct copy of a written
9 settlement demand made by the plaintiff in *Jimenez v. Sears, Roebuck and Co.* Los Angeles
10 Superior Court Case No. BC383006. The plaintiff in *Jimenez* alleges misclassification of
11 Assistant Managers employed by Defendant Sears, Roebuck and Co. at Sears Auto Centers in
12 California. Plaintiff's settlement demand was for \$10,428,603.80.

13 3. Attached hereto as **Exhibit B** is a true and correct copy of the Notice of
14 Removal filed on January 26, 2010 in *Gilhuly v. Kmart Corporation*, Northern District of
15 California Case No. 4:10-cv-00360-PJH, with all exhibits thereto.

16 4. Attached hereto as **Exhibit C** is a true and correct copy of the Declaration
17 of Robert G. Springhorn In Support of Defendant Kmart Corporation's Notice of Removal, filed
18 on January 26, 2010 in *Gilhuly v. Kmart Corporation*, Northern District of California Case No.
19 4:10-cv-00360-PJH.

20
21 I declare under penalty of perjury under the laws of the United States that the
22 foregoing is true and correct. Executed on March 25, 2010, in San Francisco, California.

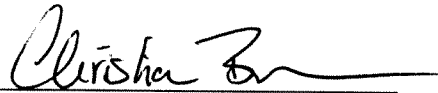
23
24 
25 Christian N. Brown

EXHIBIT A

SEARS- DAMAGE CALCULATIONS

ASSUMPTIONS BASED ON SEARS DATA:

- 1- 9783 workweeks through 1/10/10;
- 2- 12,649 workweeks through Preliminary Approval of 4/30/10;
- 3- Average hourly straight time rate is \$21.30;
- 4- Average hourly overtime rate is \$31.95;
- 5- Number of former employees- 136.

OVERTIME- \$31.95 per hour X 14.8 OT hours / week X 12,649 workweeks = \$5,981,206.10.

Add interest at 10% per year for a total of \$7,476,650.60

MEAL PERIOD VIOLATIONS- \$21.30 X 4.1 violations/week X 12,649 workweeks =\$1,107,257

REST PERIOD VIOLATIONS- \$21.30 X 4.4 violations/week X 12,649 workweeks =\$1,185,464.20

203 PENALTIES- \$21.30 X 8 hours/day X 30 days = \$5112/ per former employee X 136 formers = \$659,232

TOTAL DAMAGES- \$10,428,603.80

EXHIBIT B

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Defendant
KMART CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

MICHAEL GILHULY, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

KMART CORPORATION; and DOES 1
through 100, inclusive,

Defendants.

Case No.

NOTICE OF REMOVAL

PJH

SONNENSCHN NATH & ROSENTHAL LLP
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1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
 2 NORTHERN DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HIS ATTORNEYS
 3 OF RECORD:

4 PLEASE TAKE NOTICE that pursuant to the Class Action Fairness Act ("CAFA"), 28
 5 U.S.C. § 1332, 28 U.S.C. §1441, 28 U.S.C. § 1446 and 28 U.S.C. § 1453, defendant Kmart
 6 Corporation ("Kmart") hereby removes the above-captioned matter from the Superior Court of
 7 the State of California, Alameda County to this Court. The grounds for removal are as follows:

8 **I. BACKGROUND**

9 1. On December 23, 2009, plaintiff Michael Gilhuly ("Plaintiff") filed a civil action,
 10 on behalf of a putative California class, in the Superior Court of the State of California for the
 11 Court of Alameda, entitled *Michael Gilhuly, individually and on behalf those similarly situated,*
 12 *v. Kmart Corporation*, Case No. RG 09490829 (the "Complaint"). Pursuant to 28 U.S.C. §
 13 1446(a), Kmart has attached all pleadings filed and served upon it in the state court proceedings
 14 as Exhibit A.

15 2. The Complaint asserts causes of action for: (1) failure to pay overtime and
 16 regular wages (violation of California Labor Code §§510, 1194 and 1198); (2) failure to provide
 17 meal and rest periods (violation of California Labor Code §§ 226.7 and 512); (3) failure to
 18 provide accurate itemized wage statements (Labor Code §§ 226 and 1174); (4) failure to pay
 19 wages on termination (Labor Code § 203 ("waiting time" penalties)); and (5) unfair business
 20 practices under the California Unfair Competition Act (Cal. Bus. & Prof. Code § 17200-17208).

21 3. The Complaint names defendant Kmart, a non-California corporation with its
 22 principal place of business in Illinois. Kmart was first served with a copy of the summons and
 23 complaint on December 28, 2009. Thus, this Notice of Removal is timely filed in accordance
 24 with 28 U.S.C. § 1446(b).

25 4. The state court action is removable to this Court, and this Court has jurisdiction
 26 over this action, under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332, as well as
 27 28 U.S.C. § 1441 (a) and (b), and 28 U.S.C. § 1453, because this is a putative class action
 28 involving more than 100 putative class members, the aggregate amount in controversy,

1 excluding interest and costs, exceeds more than \$ 5,000,000, and, as discussed below, there is
2 minimal, in fact complete, diversity.

3 **II. This Court Has Jurisdiction Over This Action Under CAFA.**

4 5. Plaintiff alleges that this case is brought as a class action and appears to seek
5 certification of a putative class under California Code of Civil Procedure section 382. (Compl.,
6 at ¶¶ 13, 16.) Plaintiff filed this putative class action on behalf of “all persons who were
7 employed as exempt Sales Coaches, Operations Managers, Merchandise Managers and/or the
8 equivalent by Kmart Corporation in one or more of its retail store locations in California at any
9 time on or after December 23, 2005.” (Compl., at ¶ 21.) Therefore, this action is a proposed
10 “class action” under 28 U.S.C. § 1332(d)(1)(B), defined as “any civil action filed under Rule 23
11 of the Federal Rules of Civil Procedure or similar State statute of rule of judicial procedure
12 authorizing an action to be brought by one or more representative persons as a class action.”

13 6. CAFA reflects Congress’s intent to have federal courts adjudicate substantial class
14 action suits brought against out-of-state defendants. Toward that end, CAFA expands federal
15 jurisdiction over class actions, and expressly provides that class actions filed in state court are
16 removable to federal court where (a) the putative class contains at least 100 class members; (b)
17 any member of the putative class is a citizen of a State different from that of any defendant; and
18 (c) the aggregate amount in controversy for the putative class exceeds \$5,000,000, exclusive of
19 interest and costs. 28 U.S.C. § 1332(d); *accord Serrano v. 180 Connect, Inc.*, 478 F.3d 1018,
20 1020-1021 (9th Cir. 2007). This suit satisfies all the requirements under CAFA for federal
21 jurisdiction.

22 **A. The Putative Class Exceeds 100 Members.**

23 7. CAFA requires that the class consist of at least 100 persons. 28 U.S.C. §
24 1332(d)(5). That requirement is met here because the Complaint alleges that the putative class
25 “is well into the hundreds of individuals.” (Compl., ¶ 23(a); *see also* Declaration of Robert G.
26 Springhorn (“Springhorn Dec.”, ¶ 3) (noting that based on Kmart’s electronic records, it appears
27 that there are 343 putative class members.)
28

B. Minimal Diversity Exists.

8. The second CAFA requirement is minimal diversity — at least one putative class member and at least one defendant must be citizens of different states. 28 U.S.C. § 1332(d)(2). Here, the putative class contains at least one putative class member who is a citizen of the State of California, namely, plaintiff Michael Gilhuly. (Compl., ¶¶ 1, 12.) Defendant Kmart is incorporated under the laws of the State of Michigan, and has its principal place of business in Illinois. 28 U.S.C. § 1332(c)(1). Accordingly, there is plainly minimal diversity here. 28 U.S.C. § 1332(d)(2).

C. The CAFA Amount In Controversy Requirement Is Satisfied.

9. CAFA also requires that the aggregate amount in controversy exceed \$5,000,000 for the entire putative class, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2) (“In any class action, the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”)

10. When a plaintiff fails to plead a specific amount of damages and if the amount in controversy is not “facially apparent” from the complaint, “the court may consider facts in the removal petition” to determine the amount at issue. *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (quoting *Singer v. State Farm Mut. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)). A defendant need only make a factual showing that it is more likely than not the amount in controversy exceeds \$5,000,000. *Singer*, 116 F.3d at 376. The ultimate inquiry is what “amount is put ‘in controversy’ by the plaintiff’s complaint,” not what a defendant will actually owe. *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005). In considering whether the amount in controversy is met, courts may consider the statutory maximum penalty available under the claims asserted. See *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1046 n.3 (9th Cir. 2000).

11. Kmart denies any liability in this case and intends to vigorously oppose class certification. For purposes of jurisdictional requirements for removal purposes only, however,

1 Kmart submits the following evidence showing that the allegations in the Complaint put at
2 controversy, in the aggregate, an amount that exceeds \$5,000,000.

3 12. Based on Kmart's electronic records, approximately 343 individuals worked for
4 Kmart in the job position of Sales Coaches, Operations Managers, Merchandise Managers for
5 Kmart Corporation in one or more of its retail store locations in California at any time on or
6 after December 23, 2005 ("Relevant Time Frame"). (Springhorn Dec., ¶ 3.) Based on Kmart's
7 records, Plaintiff terminated his employment with Kmart on July 23, 2007. (*Id.*, ¶ 4.) He thus
8 worked for Kmart for approximately 83 full workweeks but for less than one half of the
9 Relevant Time Frame. Kmart's electronic records indicate that Plaintiff's average hourly rate of
10 pay was approximately \$22.51 per hour. (*Id.*, ¶ 4.)

11 13. Plaintiff's first cause of action is for failure to pay overtime wages. (Compl., ¶
12 37.) Plaintiff claims he and the class "on many occasions" worked in excess of eight hours in a
13 workday and/or forty hours in a workweek. (Compl., ¶ 36.) Under California law, employees
14 not exempt for overtime laws are entitled to 1.5 their regular rate of pay for each hour worked
15 over 8 hours in a day and 40 hours in a week. Plaintiff was scheduled to work 48 hours a week
16 during the Relevant Time Frame identified in the Complaint. Without conceding that Plaintiff
17 actually worked those hours, based on that schedule, Plaintiff is expected to argue that he and
18 the putative class are entitled to 8 hours (or more) of overtime per workweek. Based on Kmart's
19 records, Plaintiff's individual claim for overtime would be approximately \$22,416.64 (8 hours
20 per week overtime at an overtime rate of \$33.76 (\$22.51 times 1.5) for 83 workweeks.)

21 Assuming Plaintiff's allegations that his claims are "typical" of the putative class (Compl., ¶
22 23(c)), the potential liability would be \$7,621,720.68 for the overtime claim alone. *See Rippee*
23 *v. Boston Market*, 408 F. Supp. 2d at 985-86 (the amount in controversy is properly evaluated
24 based on Plaintiff's allegations regarding damages and the defendant's own employment data).

25 14. Plaintiff's second cause of action alleges that Kmart failed to provide thirty-
26 minute meal periods and rest periods in violation of California Labor Code §§ 226.7 and 512.
27 (Compl., ¶¶ 43-49.) As a result, Plaintiff asserts that Kmart "never paid the one hour of
28 compensation to any Class Member[.]" (*Id.*, ¶ 49.) Plaintiff's Complaint alleges that he and the

1 class are thus entitled to an hour of pay at their regular rate of pay for each meal and rest break
 2 missed (or two hours per day worked). (*Id.*, ¶¶ 30-31.) Plaintiff's individual claim for missed
 3 meal and rest breaks based on his average hourly rate (\$22.51 and number of workweeks (83)
 4 and assuming a 5 day workweek) amounts to \$18,683.30. (*See* Springhorn Dec., ¶ 3-4.)
 5 Assuming Plaintiff's allegations that his claims are "typical" of the putative class, the potential
 6 liability would be \$6,408,371.90 for the meal and rest break claim alone. (\$18,683.30 times 343
 7 putative class members.) (*See id.*)

8 15. Plaintiff's third cause of action seeks damages as a result of Kmart's alleged
 9 failure to provide accurate itemized wage statements in violation of Labor Code section 226.
 10 (*Id.*, ¶¶ 55, 56.) Penalties of up to \$4,000 are available under Labor Code section 226. Thus,
 11 based on Plaintiff's Complaint, the amount in controversy for this claim alone is \$ 1,372,000.
 12 (\$4,000 times 343 putative class members.)

13 16. Plaintiff's fourth cause of action asserts Kmart failed to pay wages due upon
 14 termination of employment and that its failure to do so was "willful," entitling Plaintiff and
 15 putative class members to penalties. (*Id.*, ¶ 60.) Based on Kmart's electronic records,
 16 approximately 140 of the putative class members Plaintiff seeks to represent had their
 17 employment with Kmart terminated. (Springhorn Dec., ¶ 3.) Based on a calculation of
 18 Plaintiff's average daily rate of pay of \$180.08 (average hourly rate of \$22.51 times 8), the
 19 amount in controversy for Plaintiff's individual "waiting time" penalty claim under California
 20 Labor Code section 203 is approximately \$5,402.40 and the amount in controversy for the
 21 putative class he seeks to represent (assuming his claims are "typical" as he alleges) is
 22 \$756,336.00 (\$180.08 daily wages times 30 days maximum penalty times 140 terminated
 23 employees).

24 17. Additionally, attorneys' fees are included in determining the amount in
 25 controversy. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) ("[W]here an
 26 underlying statute authorizes an award of attorneys' fees . . . such fees may be included in the
 27 amount in controversy."). Here, with the exception of Plaintiff's claim under California
 28 Business and Professions Code §§ 17200, *et seq.*, all of his alleged claims allow for the recovery

1 of attorneys' fees. In a successful wage and hour class action, such attorneys' fees often exceed
2 \$500,000.

3 18. Finally, Plaintiff seeks injunctive relief, the value of which must be applied to the
4 total amount in controversy. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002)
5 (including the value of requested injunctive relief in the amount in controversy).

6 19. For all the foregoing reasons, it is evident that the \$5,000,000 CAFA amount in
7 controversy requirement is satisfied here.

8 20. Kmart will provide written notice of the filing of this Notice of Removal to
9 Plaintiff's counsel and will promptly file a copy of this Notice of Removal with the clerk of the
10 Superior Court of the State of California for the County of Alameda, as required by 28 U.S.C. §
11 1446(d).

12 WHEREFORE, Kmart respectfully requests that these proceeding, entitled *Michael*
13 *Gilhuly, individually and on behalf those similarly situated, v. Kmart Corporation*, Case No. RG
14 09490829, now pending in the Superior Court of the State of California, Alameda County, be
15 removed to this Court.

16 Dated: January 26, 2010

SONNENSCHN NATH & ROSENTHAL LLP

17
18 By: 
19

GAYLE M. ATHANACIO

20 Attorneys for Defendant
21 KMART CORPORATION
22

23 27339803
24
25
26
27
28

EXHIBIT A



FILED
ALAMEDA COUNTY

DEC 8 2009

CLERK OF THE SUPERIOR COURT
BY: *[Signature]* Deputy

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9 Attorneys for Representative Plaintiff
10 and the Plaintiff Class

11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF ALAMEDA**

13 MICHAEL GILHULY, individually, and
14 on behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 KMART CORPORATION, and DOES 1
18 through 100, inclusive,

19 Defendants.

Case No.:

1909490829

CLASS ACTION

**COMPLAINT FOR DAMAGES, INJUNCTIVE
RELIEF AND RESTITUTION**

20 Representative Plaintiff alleges as follows:

21 **PRELIMINARY STATEMENT**

22 1. This is a class action, brought on behalf of Michael Gilhuly ("Representative
23 Plaintiff") and all other persons similarly situated ("Class Members") who are or have been
24 misclassified as exempt Sales Coaches, Operations Managers, Merchandise Managers and/or the
25 equivalent by Defendant Kmart Corporation and Does 1 through 100, inclusive ("Kmart" and/or
26 "Defendant") in any Kmart store in the state of California within the applicable class period. On his
27 own behalf and on behalf of all Class Members, Representative Plaintiff seeks unpaid wages,
28 including unpaid overtime compensation and interest thereon, and other penalties, injunctive and
other equitable relief, and reasonable attorneys' fees and costs, under, *inter alia*, Title 8 of the

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1 California Code of Regulations, California Business and Professions Code §§ 17200, *et seq.*,
2 California Code of Civil Procedure § 1021.5, and various provisions of the California Labor Code.

3 2. The "Class Period" is designated as the time from December 23, 2005 through the
4 trial date, based upon the allegation that the violations of California's wage and hour laws, as
5 described more fully below, have been ongoing throughout that time.

6 3. During this Class Period, Kmart has had a consistent policy of (1) permitting,
7 encouraging and/or requiring its allegedly overtime-exempt Sales Coaches, Operations Managers,
8 Merchandise Managers and/or the equivalent, including the Representative Plaintiff and Class
9 Members, to work in excess of eight hours per day and in excess of forty hours per week without
10 paying them overtime compensation as required by California's wage and hour laws, (2) unlawfully
11 denying the Representative Plaintiff and Class Members statutorily-mandated meal periods and rest
12 periods, and (3) willfully failing to provide the Representative Plaintiff and the Class Members with
13 accurate semi-monthly itemized wage statements reflecting the total number of hours each worked,
14 the applicable deductions and the applicable hourly rates in effect during the pay period. In addition,
15 Representative Plaintiff alleges, on information and belief, that Kmart has had a consistent policy
16 of willfully failing to pay compensation (including unpaid overtime) in a prompt and timely manner
17 to Class Members whose employment with Kmart has terminated.

18 19 INTRODUCTION

20 4. Kmart is a wholly owned subsidiary of Sears Holdings Corporation. Kmart purports
21 to be a mass merchandising company that offers customers "quality products through a portfolio of
22 exclusive brands and labels."

23 5. As of January 31, 2009, Kmart operates approximately 1,368 stores across 49 states,
24 Guam, Puerto Rico and the U.S. Virgin Islands. Also, Hoovers indicates that Kmart's sales are
25 approximately \$16 billion.

26 6. According to the company website, Kmart employs more than 133,000 associates.
27 Representative Plaintiff is informed and believes and, on that basis, alleges that within the Class
28 Period, Kmart Corporation employed individuals who occupied the position of Sales Coach,

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1 Operations Manager, Merchandise Manager and/or the equivalent at one or more Kmart stores, an
2 employment position which has not, and currently does not, meet any test for exemption from the
3 payment of overtime wages or the entitlement to meal period and rest periods.

4 7. Despite actual knowledge of these facts and legal mandates, Kmart has enjoyed an
5 advantage over its competition and a resultant disadvantage to its workers by electing not to pay
6 premium (overtime) and/or "penalty" (a.k.a. "waiting time") wages to its Sales Coaches, Operations
7 Managers, Merchandise Managers and/or the equivalent at its Kmart stores.

8 8. Representative Plaintiff is informed and believes and, based thereon, alleges that
9 officers of Kmart Corporation knew of these facts and legal mandates, yet, nonetheless, repeatedly
10 authorized and/or ratified the violation of the laws cited herein.

11 9. Despite Kmart's knowledge of Class Members' entitlement to premium (overtime)
12 pay and meal and rest periods for all applicable work periods, Kmart failed to provide same in
13 violation of California state statutes, any applicable California Industrial Welfare Commission
14 Order, and Title 8 of the California Code of Regulations. This action is brought to redress and end
15 this long-time pattern of unlawful conduct once and for all.

16 JURISDICTION AND VENUE

17
18 10. This Court has jurisdiction over the Representative Plaintiff's and Class Members'
19 claims for unpaid wages and/or penalties under, *inter alia*, any applicable Industrial Welfare
20 Commission Wage Order, Title 8 of the California Code of Regulations, California Labor Code §§
21 201-204, 226.7, 510, 512, 1194 and 1198, and/or California Code of Civil Procedure § 1021.5.

22 11. This Court also has jurisdiction over the Representative Plaintiff's and Class
23 Members' claims for injunctive relief and restitution of ill-gotten benefits arising from Kmart's
24 unfair and/or fraudulent business practices under California Business & Professions Code §§ 17200,
25 *et seq.*

26 12. Venue as to Kmart Corporation is proper in this judicial district, pursuant to
27 California Code of Civil Procedure § 395(a). Kmart maintains stores within Alameda County,
28 transacts business, has agents, and is otherwise within this Court's jurisdiction for purposes of

1 service of process. The unlawful acts alleged herein have a direct effect on the Representative
 2 Plaintiff and those similarly situated within the State of California and within Alameda County.
 3 Kmart Corporation operates said facilities and has employed numerous Class Members in Alameda
 4 County as well as in other counties within the State of California.

5 6 PLAINTIFFS

7 13. Representative Plaintiff Michael Gilhuly is a natural person who was employed by
 8 Kmart during the Class Period. Specifically, Representative Plaintiff worked as a Sales Coach,
 9 Operations Manager, and Merchandise Manager in two separate retail locations in the State of
 10 California.

11 14. As used throughout this Complaint, the term "Class Members" refers to the
 12 Representative Plaintiff herein as well as each and every person eligible for membership in the class
 13 of persons as further described and defined herein.

14 15. At all times herein relevant, the Representative Plaintiff was and is now a person
 15 within the class of persons further described and defined herein.

16 16. The Representative Plaintiff brings this action on behalf of himself and as a class
 17 action, pursuant to California Code of Civil Procedure § 382, on behalf of all persons similarly
 18 situated and proximately damaged by the unlawful conduct described herein.

19 20 DEFENDANTS

21 17. At all times herein relevant, Kmart Corporation was, and is, a leading mass
 22 merchandising retailer within the state of California selling a wide assortment of general
 23 merchandise including apparel, food, electronics and Sears brand home appliances.

24 18. Those defendants identified as Does 1 through 100, inclusive, are and were, at all
 25 relevant times herein-mentioned, officers, directors, partners, and/or managing agents of some or
 26 each of the remaining defendants. Representative Plaintiff is informed and believes and, on that
 27 basis, alleges that at all relevant times herein mentioned, Kmart and those identified as Does 1
 28 through 100, inclusive, employed and/or exercised control over the wages, hours and/or working

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conditions of the Representative Plaintiff and Class Members at various California locations, as identified in the preceding paragraph.

19. The Representative Plaintiff is unaware of the true names and capacities of those defendants sued herein as Does 1 through 100, inclusive and, therefore, sues these defendants by such fictitious names. The Representative Plaintiff will seek leave of Court to amend this Complaint when such names are ascertained. The Representative Plaintiff is informed and believes and, on that basis, alleges that each of the fictitiously-named defendants was responsible in some manner for, gave consent to, ratified and/or authorized the conduct herein alleged and that the Representative Plaintiff's and Class Members' damages, as herein alleged, were proximately caused thereby.

20. The Representative Plaintiff is informed and believes and, on that basis, alleges that, at all relevant times herein mentioned, each of the defendants was the agent and/or employee of each of the remaining defendants and, in doing the acts herein alleged, was acting within the course and scope of such agency and/or employment.

CLASS ACTION ALLEGATIONS

21. Representative Plaintiff brings this action individually, and as a class action on behalf of all persons similarly situated and proximately damaged by Kmart's conduct, including, but not necessarily limited to, the following Plaintiff Class:

All persons who were employed as exempt Sales Coaches, Operations Managers, Merchandise Managers and/or the equivalent by Kmart Corporation in one or more of its retail store locations in California at any time on or after December 23, 2005.

22. Kmart Corporation, its officers and directors are excluded from the Plaintiff Class.

23. This action has been brought and may properly be maintained as a class action under California Code of Civil Procedure § 382 because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

a. Numerosity: A class action is the only available method for the fair and efficient adjudication of this controversy. The members of the Plaintiff Class are so numerous that joinder of all members is impractical, if not impossible, insofar as Representative Plaintiff is informed and believes and, on that basis, alleges that, the total number of class members is well into the hundreds of

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individuals. Membership in the Class will be determined upon analysis of employee and payroll, among other, records maintained by Kmart.

b. Commonality: The Representative Plaintiff and the Class Members share a community of interests in that there are numerous common questions and issues of fact and law which predominate over any questions and issues solely affecting individual members, including, but not necessarily limited to:

i. whether Kmart violated the applicable California Wage Order(s) and/or California Labor Code § 510 by failing to pay overtime compensation to Class Members who worked in excess of forty hours per week and/or eight hours a day;

ii. whether Kmart violated California Business and Professions Code § 17200 by failing to pay overtime compensation to Class Members who worked in excess of forty hours per week and/or eight hours a day;

iii. whether Kmart violated, and continues to violate, California Labor Code §§ 226.7 and/or 512 by failing to consistently provide meal and/or rest periods to Class Members;

iv. whether Kmart violated, and continues to violate, California Labor Code § 1174 by failing to keep accurate records of the Class Members' hours of work;

v. whether Kmart violated, and continues to violate California Labor Code §§ 201-204 by failing to pay overtime wages due and owing at the time particular Class Members' employment with Kmart terminated; and

vi. whether Kmart violated, and continues to violate, California Labor Code § 226 by failing to provide semi-monthly itemized wage statements to Class Members of total hours worked and all applicable hourly rates in effect during the pay period.

vii. whether Class Members are entitled to "waiting time" penalties, pursuant to California Labor Code § 203 and/or 204.

c. Typicality: The Representative Plaintiff's claims are typical of the claims of Class Members. The Representative Plaintiff and Class Members sustained damages arising out of and caused by Kmart's common course of conduct in violation of law, as alleged herein.

d. Superiority of Class Action: Since the damages suffered by individual Class Members, while not inconsequential, may be relatively small, the expense and burden of individual litigation by each member makes or may make it impractical for Class Members to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to be brought by each individual Class Member, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the

litigants. The prosecution of separate actions would also create a risk of inconsistent rulings, which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests.

- c. Adequacy of Representation: The Representative Plaintiff in this class action is an adequate representative of the Plaintiff Class, in that the Representative Plaintiff's claims are typical of those of the Plaintiff Class and the Representative Plaintiff has the same interest in the litigation of this case as the Class Members. The Representative Plaintiff is committed to vigorous prosecution of this case and has retained competent counsel, experienced in conducting litigation of this nature. The Representative Plaintiff is not subject to any individual defenses unique from those conceivably applicable to Class Members as a whole. The Representative Plaintiff anticipates no management difficulties in this litigation.

COMMON FACTUAL ALLEGATIONS

24. As described herein, Kmart has, for years, knowingly failed to adequately compensate those employees within the class definition identified above for all wages earned, including premium wages such as overtime wages and/or compensation for missed meal and/or rest periods, as are due under the California Labor Code and California Wage Order No. 7, thereby enjoying a significant competitive edge over other retailers.

25. Kmart has declined to pay these wages even upon Class Members' terminations or resignations from employment, in blatant violation of California Labor Code §§ 201 and/or 202.

26. California Labor Code §§ 201 and 202 require defendant Kmart to pay severed employees all wages owed to the employee immediately upon discharge or within 72 hours of resignation of their positions, in most circumstances. California Labor Code § 203 provides that, if an employer willfully fails to timely pay such wages, the employer must, as a penalty, continue to pay the subject employees' wages until the back wages are paid in full or an action is commenced, and shall continue to accrue for a period of time up to thirty days.

27. Furthermore, despite its knowledge of the Representative Plaintiff's and the Class Members' entitlement to compensation for all hours worked, Kmart violated California Labor Code § 1174(d) by failing to provide or require the use, maintenance or submission of time records by members of the class. Kmart also failed to provide Representative Plaintiff and Class Members with accurate semimonthly itemized statements of the total number of hours worked by each and all

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1 applicable hourly rates in effect during the pay period, in violation of California Labor Code § 226.
2 In failing to provide the required documents, Kmart has not only failed to pay its workers the full
3 amount of compensation due, but the company has also, until now, effectively shielded itself from
4 its employees' scrutiny by concealing the magnitude and financial impact of its wrongdoing that
5 such documents might otherwise have led workers to discover.

6 28. Representative Plaintiff and all persons similarly situated are entitled to unpaid
7 compensation, yet, to date, have not received such compensation despite termination and/or
8 resignation from Kmart. More than thirty days have passed since the Representative Plaintiff and
9 certain Class Members have left Kmart's employ.

10 29. As a consequence of Kmart's willful conduct in not paying former employees
11 compensation for all hours worked in a prompt and timely manner, certain Class Members are
12 entitled to up to thirty days wages, as a penalty under California Labor Code § 203, together with
13 attorneys' fees and costs.

14 30. As a consequence of Kmart's willful conduct in not providing an uninterrupted thirty
15 minute meal period within the first five hours of Class Members' shifts, as required under California
16 Labor Code § 512 and Section 11 of IWC Wage Order No. 7, Class Members are entitled to one
17 hour of wages for each day that they were denied at least one meal period, as provided under
18 California Labor Code § 226.7, together with interest thereon and attorneys' fees and costs.

19 31. As a consequence of defendant Kmart's willful conduct in not providing a ten minute
20 rest period during each four hour segment of work, as required under Section 12 of IWC Wage
21 Order No. 7, Class Members are entitled to one hour of wages for each day that they were denied
22 at least one rest period, as provided under California Labor Code § 226.7, together with interest
23 thereon and attorneys' fees and costs.

24 32. The Representative Plaintiff is informed and believes and, on that basis, alleges that
25 Defendant's failure to make available meal and/or rest periods entitled the Plaintiff Class to wages
26 therefor, yet said wages were not paid in accordance with California Labor Code § 204, in further
27 violation of the law (*inter alia*, California Labor Code § 226).

28 ///

1 33. As a direct and proximate result of Kmart's unlawful conduct, as set forth herein,
 2 Representative Plaintiff and Class Members have sustained damages, as described above, including
 3 compensation for missed meal and rest periods, and loss of earnings for hours worked on behalf of
 4 Defendant, in an amount to be established at trial. As a further direct and proximate result of
 5 Defendant's unlawful conduct, as set forth herein, Representative Plaintiff and/or certain Class
 6 Members are entitled to recover "waiting time" penalties (pursuant to California Labor Code § 203)
 7 and penalties for failure to provide semimonthly statements of hours worked and all applicable
 8 hourly rates (pursuant to California Labor Code § 226) in an amount to be established at trial. As
 9 a further direct and proximate result of Defendant's unlawful conduct, as set forth herein,
 10 Representative Plaintiff and Class Members are also entitled to recover costs and attorneys' fees,
 11 pursuant to California Labor Code § 1194 and/or California Civil Code § 1021.5, among other
 12 authorities.

13 34. Representative Plaintiff seeks injunctive relief, prohibiting Defendant from engaging
 14 in the complained-of illegal labor acts and practices in the future. Representative Plaintiff also seeks
 15 restitution of costs incurred by Representative Plaintiff and Class Members under California's
 16 Unfair Competition Law. Unless enjoined, Defendant's unlawful conduct will continue unchecked,
 17 while Representative Plaintiff and Class Members bear the financial brunt of Defendant's unlawful
 18 conduct. As a further direct and proximate result of Defendant's unlawful conduct, as set forth
 19 herein, Representative Plaintiff and the Plaintiff Class are also entitled to recover costs and
 20 attorneys' fees, pursuant to statute.

21
 22 **FIRST CAUSE OF ACTION**
 23 **UNLAWFUL FAILURE TO PAY OVERTIME WAGES**
 24 **(Violation of California Wage Order 7 and California Labor Code §§ 510, 1194 and 1198)**

25 35. Representative Plaintiff incorporates in this cause of action each and every allegation
 26 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

27 36. During the Class Period, the Representative Plaintiff and the Class Members worked,
 28 on many occasions, in excess of eight hours in a workday and/or forty hours in a workweek. The
 precise number of overtime hours will be proven at trial.

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1 37. During said time period, Kmart refused to compensate the Representative Plaintiff
2 and Class Members for all of the overtime wages earned; in violation of the applicable Wage Order,
3 and provisions of the California Labor Code.

4 38. Moreover, during said time period, many of the Class Members herein were
5 employed by and thereafter terminated or resigned from their positions with Kmart, yet were not
6 paid all wages due upon said termination or within seventy-two hours of said resignation of
7 employment therefrom. Said non-payment of all wages due was the direct and proximate result of
8 a willful refusal to do so by Kmart.

9 39. At all relevant times, Kmart was aware of, and was under a duty to comply with, the
10 overtime provisions of the California Labor Code, including, but not limited to, the following:

11 a. California Labor Code § 510: "Any work in excess of eight hours in one
12 workday and any work in excess of 40 hours in any one workweek and the
13 first eight hours worked on the seventh day of work in any one workweek
shall be compensated at the rate of no less than one and one-half times the
regular rate of pay for an employee"

14 b. California Labor Code § 1194: "Notwithstanding any agreement to work for
15 a lesser wage, any employee receiving less than the legal minimum wage or
16 the legal overtime compensation applicable to the employee is entitled to
recover in a civil action the unpaid balance of the full amount of this
minimum wage or overtime compensation, including interest thereon,
reasonable attorney's fees, and costs of suit."

17 c. California Labor Code § 1198: "[t]he maximum hours of work and the
18 standard conditions of labor fixed by the commission shall be the maximum
19 hours of work and the standard conditions of labor for employees. The
20 employment of any employee for longer hours than those fixed by the order
or under conditions of labor prohibited by the order is unlawful."

21 40. By refusing to compensate the Representative Plaintiff and Class Members for
22 overtime wages earned, Kmart violated those California Labor Code provisions cited herein, as well
23 as any applicable California Industrial Welfare Commission Wage Order.

24 41. As a direct and proximate result of Kmart's unlawful conduct, as set forth herein, the
25 Representative Plaintiff and the Plaintiff Class have sustained damages, including loss of earnings
26 for hours of overtime worked on behalf of Kmart, in an amount to be established at trial, and are
27 entitled to recover attorneys' fees and costs of suit.

28 ///

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SECOND CAUSE OF ACTION
FAILURE TO PROVIDE MEAL AND REST PERIODS
(California Labor Code §§ 226.7 and 512)

42. Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

43. At all relevant times, Kmart was aware of and was under a duty to comply with California Labor Code §§ 226.7 and 512.

44. California Labor Code § 226.7 provides:

(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

45. Moreover, California Labor Code § 512 provides:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

46. Sections 11 and 12, respectively, of the applicable IWC Wage Order mandate that employers provide all applicable meal and/or rest periods to non-exempt (including exempt-misclassified) employees.

47. Section 11 of the applicable IWC Wage Order provides:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal

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period of not less than 30 minutes (C) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

Moreover, Section 12 of the applicable IWC Wage Order provides:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

48. By failing to consistently provide uninterrupted thirty-minute meal periods within the first five hours of work each day and/or uninterrupted ten-minute net rest periods to Representative Plaintiff and the Class Members, Kmart violated California Labor Code and the IWC Wage Order provisions.

49. Representative Plaintiff is informed and believes and, on that basis, alleges that Kmart has never paid the one hour of compensation to any Class Member due to its violations of the California Labor Code and the IWC Wage Order provisions.

50. As a direct and proximate result of Kmart's unlawful conduct, as set forth herein, Representative Plaintiff and Class Members have sustained damages, including lost compensation resulting from missed meal and/or rest periods, in an amount to be established at trial. As a further direct and proximate result of Kmart's unlawful conduct, as set forth herein, certain Class Members are entitled to recover "waiting time" and other penalties, in amounts to be established at trial, as well as costs and attorneys' fees, pursuant to statute.

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THIRD CAUSE OF ACTION
FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS
(California Labor Code §§ 226 and 1174)

51. The Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

52. California Labor Code § 226(a) provides:

Each employer shall semimonthly, or at the time of each payment of wages, furnish each of his or her employees either as a detachable part of the check, draft or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized wage statement in writing showing: (1) gross wages earned; (2) total number of hours worked by each employee whose compensation is based on an hourly wage; (3) all deductions; provided, that all deductions made on written orders of the employee may be aggregated and shown as one item; (4) net wages earned; (5) the inclusive date of the period for which the employee is paid; (6) the name of the employee and his or her social security number; and (7) the name and address of the legal entity which is the employer.

53. Moreover, California Labor Code § 226(e) provides:

An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

54. Finally, California Labor Code § 1174 provides:

Every person employing labor in this state shall: (d) Keep, at a central location in the state...payroll records showing the hours worked daily by and the wages paid to ... employees These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years.

55. Representative Plaintiff seeks to recover actual damages, costs and attorneys' fees under these provisions on behalf of himself and on behalf of all Class Members.

56. Kmart failed to provide timely, accurate itemized wage statements to the Representative Plaintiff and Class Members in accordance with California Labor Code § 226. Representative Plaintiff is informed and believes and, on that basis, alleges that, none of the statements provided by Kmart has accurately reflected actual gross wages earned, net wages earned, or the appropriate deductions of such Class Members.

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III

FIFTH CAUSE OF ACTION
UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT
(California Business & Professions Code §§ 17200-17208)

63. Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

64. Representative Plaintiff further brings this cause of action seeking equitable and statutory relief to stop the misconduct of Kmart, as complained of herein, and to seek restitution from Kmart of amounts acquired through the unfair, unlawful and fraudulent business practices described herein.

65. The knowing conduct of Kmart, as alleged herein, constitutes an unlawful and/or fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-17208. Specifically, Kmart conducted business activities while failing to comply with the legal mandates cited herein.

66. Kmart's knowing failure to adopt policies in accordance with and/or to adhere to these laws, all of which are binding upon and burdensome to its competitors, engenders an unfair competitive advantage for Kmart, thereby constituting an unfair business practice, as set forth in California Business & Professions Code §§ 17200-17208.

67. Kmart has clearly established a policy of accepting a certain amount of collateral damage, as represented by the damages to the Representative Plaintiff and to Class Members herein alleged, as incidental to its business operations, rather than accept the alternative costs of full compliance with fair, lawful and honest business practices ordinarily borne by its responsible competitors and as set forth in legislation and the judicial record.

RELIEF SOUGHT

WHEREFORE, the Representative Plaintiff, on behalf of himself and the proposed Plaintiff Class, prays for judgment and the following specific relief against Defendants, and each of them, jointly and separately, as follows:

1. That the Court declare, adjudge and decree that this action is a proper class action and certify the proposed Representative Class and/or any other appropriate subclasses under California

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1 Code of Civil Procedure § 382;

2 2. That the Court declare, adjudge and decree that Kmart violated the overtime
3 provisions of the California Labor Code and the applicable California Industrial Welfare
4 Commission Wage Order as to the Representative Plaintiff and Class Members;

5 3. That the Court declare, adjudge and decree that Kmart willfully violated its legal
6 duties to pay overtime under the California Labor Code and the applicable California Industrial
7 Welfare Commission Wage Order;

8 4. That the Court declare, adjudge and decree that the Representative Plaintiff and Class
9 Members were, at all times relevant hereto, and are still, entitled to be paid overtime for work
10 beyond forty hours in a week;

11 5. That the Court make an award to the Representative Plaintiff and Class Members of
12 damages and/or restitution for the amount of unpaid overtime compensation, including interest
13 thereon, and penalties in an amount to be proven at trial;

14 6. That the Court make an award to the Representative Plaintiff and the Class Members
15 of one hour of pay at each employee's regular rate of compensation for each workday that a meal
16 period was not provided;

17 7. That the Court make an award to the Representative Plaintiff and the Class Members
18 of one hour of pay at each employee's regular rate of compensation for each workday that a rest
19 period was not provided;

20 8. That the Court find that Kmart has willfully violated California Labor Code §§ 201-
21 204 by failing pay "waiting time" penalties to particular Class Members;

22 9. That the Court order Kmart to pay restitution to the Representative Plaintiff and the
23 Class Members due to Kmart's unlawful activities, pursuant to California Business and Professions
24 Code §§ 17200-17208;

25 10. That the Court further enjoin Kmart, ordering it to cease and desist from unlawful
26 activities in violation of California Business and Professions Code §§ 17200, *et seq.*;

27 11. For all other Orders, findings and determinations identified and sought in this
28 Complaint;

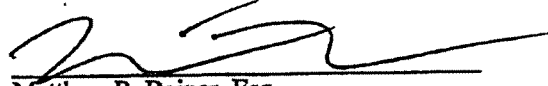
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12. For interest on the amount of any and all economic losses, at the prevailing legal rate;
13. For reasonable attorneys' fees, pursuant to California Labor Code § 1194 and/or California Code of Civil Procedure § 1021.5; and
14. For costs of suit and any and all such other relief as the Court deems just and proper.

Dated: December 23, 2009

SCOTT COLE & ASSOCIATES, APC

By:


Matthew R. Bainer, Esq.
Attorneys for the Representative Plaintiff
and the Plaintiff Class

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|---|--|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Matthew R. Bainer (S.B. #220972) SCOTT COLE & ASSOCIATES, APC 1970 Broadway, Ninth Floor Oakland, CA 94612 TELEPHONE NO.: (510) 891-9800 FAX NO.: (510) 891-7030 ATTORNEY FOR (Name): Representative Plaintiff and the Plaintiff Case | | FOR "8124773" FILED ALAMEDA COUNTY -DEC 23 2009 <i>Matthew R. Bainer</i> By _____ Deputy |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME: Rene C. Davidson Courthouse | | |
| CASE NAME: MICHAEL GILHULY vs. KMART CORPORATION | | |
| CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less) | Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402) | |
| Items 1-6 below must be completed (see instructions on page 2). | | CASE NUMBER: 109490629 JUDGE: DEPT: |

1. Check one box below for the case type that best describes this case:
- | | | |
|---|---|---|
| Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other P/DP/DWD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/DP/DWD (23) Non-P/DP/DWD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/DP/DWD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input checked="" type="checkbox"/> Other employment (15) | Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandamus (02) <input type="checkbox"/> Other judicial review (39) | Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43) |
|---|---|---|
2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|---|--|
| a. <input type="checkbox"/> Large number of separately represented parties b. <input checked="" type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve c. <input type="checkbox"/> Substantial amount of documentary evidence | d. <input checked="" type="checkbox"/> Large number of witnesses e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision |
|---|--|
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify):
5. This case ☒ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: December 23, 2009

Matthew R. Bainer

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

 Form Adopted for Mandatory Use
 Judicial Council of California
 CM-010 (Rev. July 1, 2007)
CIVIL CASE COVER SHEET
 Cal. Rules of Court, rules 2.30, 3.220, 3.400-3.403, 3.740;
 Cal. Standards of Judicial Administration, art. 3.10
www.courtinfo.ca.gov

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CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties In Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties In Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) (if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)

Other P/DPDWD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability (not asbestos or toxic/environmental) (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other P/DPDWD (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PDWD (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other P/DPDWD

Non-P/DPDWD (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) (not civil harassment) (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice (not medical or legal)
Other Non-P/DPDWD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract (not unlawful detainer or wrongful eviction)
Contract/Warranty Breach—Seller Plaintiff (not fraud or negligence)
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage (not provisionally complex) (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property (not eminent domain, landlord/tenant, or foreclosure)

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) (if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims (arising from provisionally complex case type listed above) (41)
Enforcement of Judgment
Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment (non-domestic relations)
Sister State Judgment
Administrative Agency Award (not unpaid taxes)
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint (not specified above) (42)
Declaratory Relief Only
Injunctive Relief Only (non-harassment)
Mechanics Lien
Other Commercial Complaint Case (non-tort/non-complex)
Other Civil Complaint (non-tort/non-complex)

Miscellaneous Civil Petition

Partnership and Corporate Governance (21)
Other Petition (not specified above) (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief From Late Claim
Other Civil Petition

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

KMART CORPORATION, and DOES 1 through 100, inclusive,

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

MICHAEL GILHULY, individually, and on behalf of all others
similarly situated,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)
FILED
ALAMEDA COUNTY

DEC 28 2009

CLERK OF THE SUPERIOR COURT
[Signature] Deputy

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Alameda County Superior Court
1225 Fallon Street, Oakland, CA 94612

CASE NUMBER
(Número de caso): 09490829

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Matthew R. Bainer, Esq., Scott Cole & Associates, 1970 Broadway, North Room, Oakland, CA 94612-4612

DATE:
(Fecha)

DEC 28 2009

PAT S. SWEETEN

Clerk, by
(Secretario)

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
- ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
- ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)

4. ☐ other (specify):
5. ☐ by personal delivery on (date):



Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 (Rev. July 1, 2008)

SUMMONS

Page 1 of 1
Code of Civil Procedure §§ 412.20, 465
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorld.com

Scott Cole & Associates, APC
 Attn: Bainer Esq. Matthew R.
 1970 Broadway, Ninth Floor
 Oakland, CA 94612

Kmart Corporation

**Superior Court of California, County of Alameda
 Rene C. Davidson Alameda County Courthouse**

Gilhuly

Plaintiff/Petitioner(s)

VS.

No. RG09490829

Kmart Corporation

Defendant/Respondent(s)

(Abbreviated Title)

NOTICE OF HEARING

To each party or to the attorney(s) of record for each party herein:

Notice is hereby given that the above entitled action has been set for:
 Case Management Conference

You are hereby notified to appear at the following Court location on the date and time noted below:

Case Management Conference:

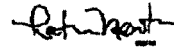
DATE: 04/23/2010 TIME: 10:00 AM DEPARTMENT: 20

LOCATION: Administration Building, Fourth Floor
 1221 Oak Street, Oakland

Dated: 12/31/2009

Executive Officer / Clerk of the Superior Court

By




Deputy Clerk

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served this Notice by placing copies in envelopes addressed as shown hereon and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Executed on 12/31/2009.

By



Deputy Clerk

Scott Cole & Associates, APC
 Attn: Bainer Esq. Matthew R.
 1970 Broadway, Ninth Floor
 Oakland, CA 94612

Kmart Corporation

**Superior Court of California, County of Alameda
 Rene C. Davidson Alameda County Courthouse**

Gilhuly

Plaintiff/Petitioner(s)

VS.

Kmart Corporation

Defendant/Respondent(s)

(Abbreviated Title)

No. RG09490829

NOTICE OF HEARING

To each party or to the attorney(s) of record for each party herein:

Notice is hereby given that the above-entitled action has been set for:

Complex Determination Hearing

You are hereby notified to appear at the following Court location on the date and time noted below:

Complex Determination Hearing:

DATE: 03/19/2010 **TIME:** 11:00 AM **DEPARTMENT:** 20

LOCATION: Administration Building, Fourth Floor
 1221 Oak Street, Oakland

Pursuant to California Rules of Court, Rule 3.400 et seq. and Local Rule 4.2 (Unified Rules of the Superior Court, County of Alameda), the above-entitled matter is set for a Complex Litigation Determination Hearing and Initial Complex Case Management Conference.

Department 20 issues tentative rulings on DomainWeb (www.alameda.courts.ca.gov/domainweb). For parties lacking access to DomainWeb, the tentative ruling must be obtained from the clerk at (510) 267-6936. Please consult Appendix E to Local Rules 4 and 5 of the Unified Rules of the Superior Court, County of Alameda, concerning the tentative ruling procedures for Department 20.

Counsel or party requesting complex litigation designation is ordered to serve a copy of this notice on all parties omitted from this notice or brought into the action after this notice was mailed.

All counsel of record and any unrepresented parties are ordered to attend this Initial Complex Case Management Conference unless otherwise notified by the Court.

Failure to appear, comply with local rules or provide a Case Management Conference statement may result in sanctions.

All motions in this matter to be heard prior to Complex Litigation Determination Hearing must be scheduled for hearing in Department 20.

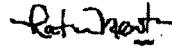
If the information contained in this notice requires change or clarification, please contact the courtroom clerk for Department 20 by e-mail at Dept.20@alameda.courts.ca.gov or by phone at (510) 267-6936.

TELEPHONIC COURT APPEARANCES at Case Management Conferences may be available by contacting CourtCall, an independent vendor, at least 3 business days prior to the scheduled conference. Parties can make arrangements by calling (888) 882-6878, or faxing a service request form to (888) 883-2946. This service is subject to charges by the vendor.

Dated: 12/31/2009

Executive Officer / Clerk of the Superior Court

By



Deputy Clerk

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served this Notice by placing copies in envelopes addressed as shown hereon and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Executed on 12/31/2009.

By



Deputy Clerk

Matthew R. Bainer, Esq. (S.B. #220972)
 Molly A. Kuehn, Esq. (S.B. #230763)
SCOTT COLE & ASSOCIATES, APC
 1970 Broadway, Ninth Floor
 Oakland, California 94612
 Telephone: (510) 891-9800
 Facsimile: (510) 891-7030
 web: www.scalaw.com

Attorneys for the Representative Plaintiff
 and the Plaintiff Class

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MICHAEL GILHULY, individually, and
 on behalf of all others similarly situated,

Plaintiffs,

vs.

KMART CORPORATION, and DOES 1
 through 100, inclusive,

Defendants.

Case No.: RG09490829

CLASS ACTION

PROOF OF SERVICE

SCOTT COLE & ASSOCIATES, APC
 ATTORNEYS AT LAW
 THE WACHOVIA TOWER
 1970 BROADWAY, NINTH FLOOR
 OAKLAND, CA 94612
 TEL: (510) 891-9800

1 **PROOF OF SERVICE**

2 I am over 18 years of age and not a party to the within entitled action. I am employed at and my
3 business address is the law offices of Scott Cole & Associates, A Professional Corporation, 1970
Broadway, Ninth Floor, Oakland, California 94612. On this date, I served a copy of:

4 **NOTICE OF HEARING**

5 by the following method(s):

6 [X] by placing one true copy thereof enclosed in a sealed envelope, and serving same as follows:

7 [] by personally delivering same addressed as shown below, to an attorney, as indicated
8 below, at the indicated address and serving same in accordance with CCP § 1011(a)
by leaving same at the attorney's office, with the envelope being clearly labeled, as
9 below, to indicate the attorney(s) being served, with a receptionist or with a person
having charge thereof;

10 [X] by placing same, with postage fully prepaid, with United States Mail, addressed as
11 indicated below. I am readily familiar with the practices of these law offices for
collection and processing of correspondence for mailing with the United States Postal
12 Service. Such correspondence is deposited with the United States Postal Service in
the same day in the ordinary course of business.

13 Name of Registered Agent:

14 Margaret Wilson
15 Process Specialist
16 C T Corporation
818 W. 7th Street
Los Angeles, CA 90017

17 I declare under penalty of perjury under the laws of the state of California that the foregoing
18 is true and correct. Executed at Oakland, California, on January 7, 2010

19 
20 Vahram Antonian

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

EXHIBIT C

1 GAYLE M. ATHANACIO (State Bar No. 130068)
2 VIRGINIA K. YOUNG (State Bar No. 174384)
3 MEGAN BARKER (State Bar No. 245991)
4 SONNENSCHN NATH & ROSENTHAL LLP
5 525 Market Street, 26th Floor
6 San Francisco, California 94105
7 Telephone: (415) 882-5000
8 Facsimile: (415) 882-0300
9 Email: gthanacio@sonnenschein.com
10 vyoung@sonnenschein.com
11 mbarker@sonnenschein.com

12 Attorneys for Defendant
13 KMART CORPORATION

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO/OAKLAND DIVISION

17 MICHAEL GILHULY, individually and on
18 behalf of all others similarly situated,

19 Plaintiffs,

20 vs.

21 KMART CORPORATION; and DOES 1
22 through 100, inclusive,

23 Defendants.

E-filing

ORIGINAL
FILED
200 JAN 26 P 1:51
RICHARD W. HIERING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PIH

Case No. 10-00000

DECLARATION OF ROBERT G.
SPRINGHORN IN SUPPORT OF
DEFENDANT KMART CORPORATION'S
NOTICE OF REMOVAL

SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Case No.

SPRINGHORN DECL. IN
SUPPORT OF REMOVAL

SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

1 I, Robert G. Springhorn, declare as follows:

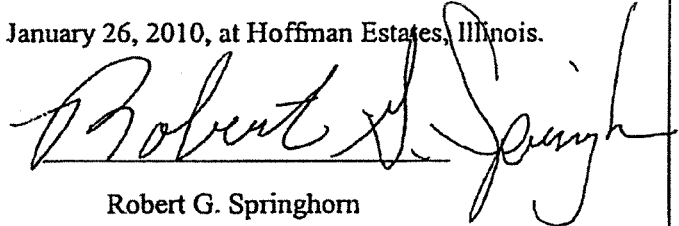
2 1. I am employed by Sears Holding Management Corporation. Sears Holding
3 Management Corporation is a subsidiary of Kmart Corporation, which owns defendant Kmart
4 Corporation ("Kmart"). As a Senior Business Analyst for Sears Holding Management
5 Corporation, I have personal knowledge of the facts set forth below and, if called as a witness,
6 could and would competently testify thereto.

7 2. Following service of the complaint in the action *Michael Gilhuly, individually and*
8 *on behalf those similarly situated, v. Kmart Corporation*, Case No. RG 09490829, Kmart
9 compiled information from its electronic human resources records regarding the number of
10 employees in California who at anytime from December 23, 2005 to January 2, 2010 (the
11 "Relevant Time Frame"), worked in the position of Sales Coaches, Operations Managers,
12 and/or Merchandise Managers. The electronic data that was used to compile this information
13 is entered and stored on Kmart's computer systems in the ordinary course and scope of
14 Kmart's business. Kmart completed compiling this information on or around January 21,
15 2010.

16 3. Based on Kmart's electronic records, approximately 343 employees of Kmart were
17 in the position(s) of Sales Coaches, Operations Managers, and/or Merchandise Managers in a
18 California store during the Relevant Time Frame. Based on Kmart's electronic records,
19 approximately 140 of these individuals had their employment with Kmart terminated.

20 4. Based on Kmart's electronic records, during the Relevant Time Frame, Plaintiff
21 held the position of Sales Coach. Relevant here, Plaintiff held that position from December
22 23, 2005, to July 23, 2007, at which time he retired. Kmart's records reflect that during this
23 Relevant Time Frame, which amounts to approximately 83 full workweeks, Plaintiff's average
24 hourly rate of pay (based upon a calculation of his average salary) was approximately \$22.51.
25
26
27
28

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on January 26, 2010, at Hoffman Estates, Illinois.

3
4 
5 Robert G. Springhorn

6 27340128
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SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000